IN THE

G. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-703

UNITED STATES OF AMERICA,

Appellant,

—v.—

FIRST NATIONAL BANCORPORATION, INC. and
THE FIRST NATIONAL BANK OF GREELEY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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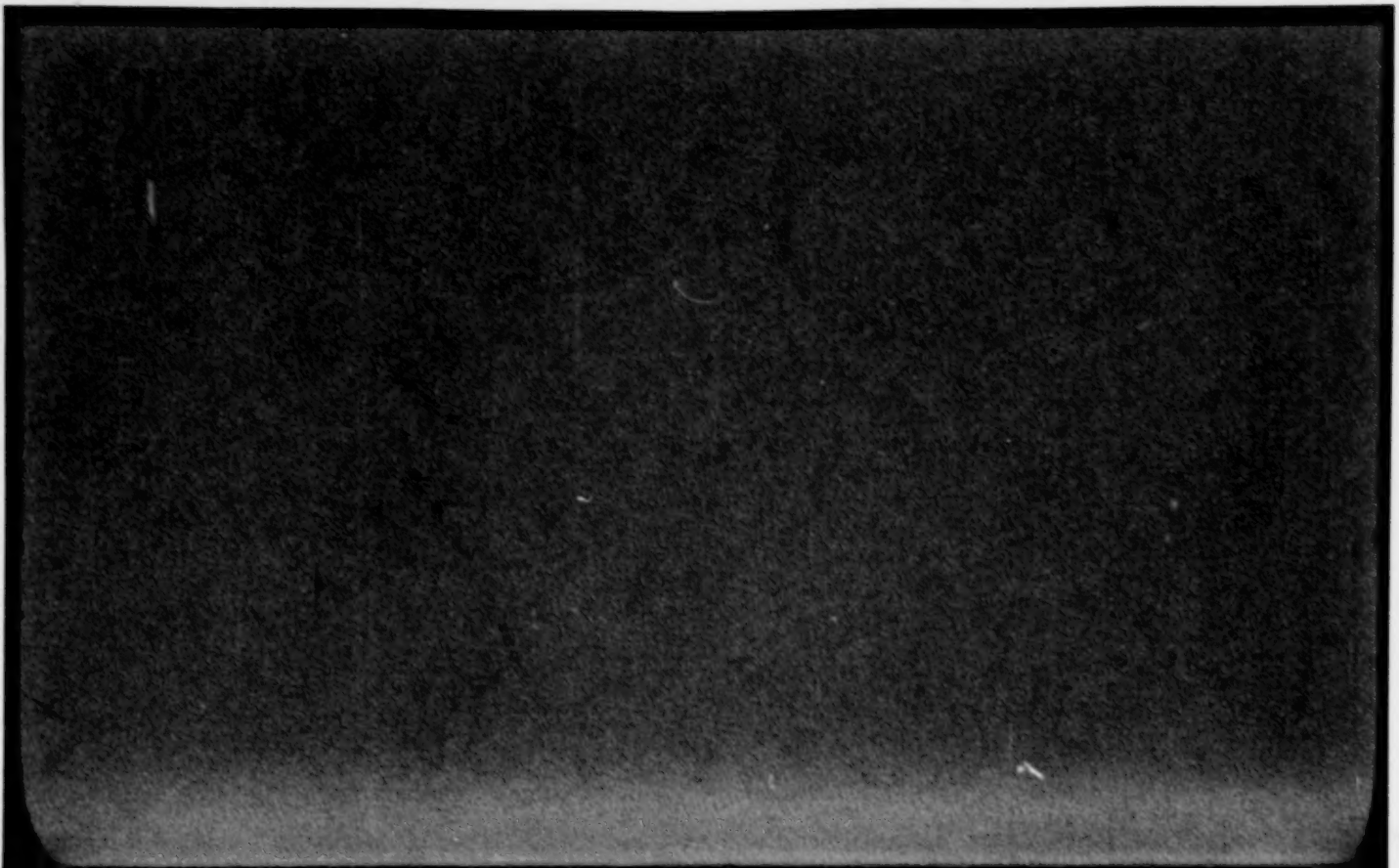

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Appellees move the Court to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifest that there are no material disputed questions of fact, and the question of law as to which review is sought is, on its face, without substantial merit.

The Principal Question Restated

Appellant's jurisdictional statement herein misstates the question presented to this Court. The question should be "Can the Department of Justice, under color of the Clayton Act, succeed to the power to regulate the structure of the banking industry, a duty which the Congress assigned to the bank regulatory agencies?"

In a thinly disguised modestly *in terrorem* argument addressed to the district court, the Department of Justice opened its case below[1] with the proud boast that this Court has *never*[2] rejected its arguments in a Clayton 7 case. Appellee[3] believes, as have all the district courts which have considered the Department of Justice's bank merger potential competition theories, that this high order of confidence has led Appellant to explore frontiers far beyond the reach of the statute it purports to enforce.[4] We suggest that humility is a virtue from which prosecutors as well as defense counsel might profit. If Appellant has won all the Clayton 7 cases before this Court to date, perhaps the Court may feel it is time a balance of sorts was struck. Certainly, no more apt vehicle could be found for that purpose.

On October 18, 1968, the First National Bank of Denver and three small suburban Denver shopping center banks it had organized (combined deposits 6/30/70, $495.7 million, PX 114), caused the formation of The First National Ban-

[1] Plaintiff's Pre-Trial Brief, p. 5.

[2] This position requires considerable suppleness in respect to the second *Penn-Olin* appeal, *United States* v. *Penn-Olin Chemical Co.*, 389 U.S. 308 (1967), affirming 246 F. Supp. 917 (D. Del. 1965) by an equally divided Court.

[3] The term "Appellee" applies jointly to the acquiror and acquiree for purposes of addressing the Court. As a business entity, the term is intended to refer to the acquiror, First National Bancorporation.

[4] *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Cal. 1967) (Judge Zirpoli), *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1967) (Judge Nixon), *United States* v. *First National Bank of Maryland*, 310 F. Supp. 157 (D. Md. 1970) (Judge Kaufman), *United States* v. *Idaho First National Bank*, 315 F. Supp. 261 (D. Idaho 1970) (Judge Boldt), and the court below, *United States* v. *First National Bancorporation*, 329 F. Supp. 1003 (D. Colo. 1971) (Judge Doyle).

poration, Inc. ("Bancorporation") as a parent bank ding company. On March 21, 1969, Bancorporation en- ed into an understanding which was to lead to its first uisition, The First National Bank of Greeley, Weld nty, Colorado ("FNB Greeley") (6/30/70 deposits, 3 million, PX 123), some fifty-two miles north of Den- . Appellant brought suit, alleging a violation of Sec- n 7 of the Clayton Act.[5]

t quickly became apparent at the trial that Appellant's position was not that the affiliation would, in reasonable bability, substantially lessen competition in *Weld nty;* but rather that large banks (relatively) in a state ht not be allowed to acquire the larger banks in local rkets if the larger banks in the state had a (subsumed) icompetitive but as yet undefined share of total state osits.[6] Appellant apparently believes that the establish-

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[5] "No corporation . . . shall acquire . . . the stock . . . of another poration . . . where in any line of commerce in any section of country, the effect of such acquisition may be substantially to en competition, or to tend to create a monopoly." (38 Stat. as amended, 64 Stat. 1125, 15 U.S.C. § 18).

[6] Appellant has not objected to the acquisition of $200 million ar banks by billion dollar banking organizations when state entages were not as high as here. Thus, it has given its nihil at—subsequent to this proposed affiliation—to the acquisition wo of the five Akron, Ohio banks (a city of 275,000) Akron ional Bank of Commerce (6/30/71) deposits of $219,152,000 nerican Bank Directory, Fall, 1971, ed.) and American Bank Commerce (6/30/71 deposits of $150,607,000 (*id.*)) by BancOhio poration (6/30/71 deposits of $1.6 billion, 28 subsidiary banks, % of $22.26 billion state deposits (*In the Matter of the Appli- on of BancOhio Corp.*, 1971 Fed. Res. Bull. ——, Order dated ember 22, 1971)), and CNB Bancorporation (6/30/71 deposits 1,288 million—including American—American Bank Directory, , 1971 ed., or 5.8% of state deposits), respectively. (For the rd's opinions in the Akron cases, see 1970 Fed. Res. Bull. 787 1971 Fed. Res. Bull. 751.) Since Bancorporation had about % of Colorado deposits ($495.7 million, PX 115) and FNB eley had $39.2 million in deposits at the time of suit (6/30/70, 74), the dividing line appears thin.

ment of such a policy would create an environment in which the prospects of maximum competitive options by market would be enhanced. Appellant has offered no facts in support of this proposition; and indeed, such objective evidence as has been adduced on the question supports a precisely contrary conclusion.

Regardless of whether we are willing to make the act of faith implicit in the creation of this epistemological bridge, what clearly emerges is Appellant's desire to regulate, to structure the banking industry along lines which it views as being in the public interest. The Clayton Act case alleged would require Appellant to prove that this affiliation would, in this market, in reasonable probability, have demonstrable and substantial anticompetitive effects. What emerged at the trial was Appellant's enunciation of a proposition, a postulate, that, all things being equal, at a point somewhere between a state deposit share of 7% and 12% in any one of the larger banks, the long range structure of banking markets in those states generally would be more diversely served if that larger bank were barred from acquiring any local banks with a substantial share of their local markets. As a regulatory philosophy we do not agree that Appellant's thesis will serve this end. We believe it to be at odds with the experience of the industry.

Be that as it may, Appellant is trenching on the province of other agencies. The power to regulate the structure of the banking industry has been assigned by the Congress to the bank regulatory agencies; specifically as to bank holding company growth, to the Federal Reserve Board. We believe that the Board has done a responsible job in discharging that duty, as indicated by its 10-year record of approvals and denials of applications (Appendix A),

when compared to Appellant's similar record. Appellant is apparently in accord with this conclusion.[7] To say that Appellant is acting in good faith in what it believes are the best interests of the industry and the public is not enough. If the power to structure the banking industry is to be transferred to the Department of Justice, that decision ought to be reserved to the Congress, and not sought via a judicial transformation of a statute which neither in terms nor as previously interpreted by this Court has been violated. Witness the court below:

> We have sought to apply the standards laid down by the Supreme Court in those cases [*Philadelphia National Bank* and *Phillipsburg*[8]] to our facts in an effort to arrive at an accurate and fair decision herein. The main difficulty here is the lack of cogent evidence which even suggests that there is likely to be a lessening of competition as a result of this present acquisition. Nothing has been presented which of itself or considered with the total circumstances serves to make any impact. (329 F. Supp. at 1016.)

Courts concern themselves with evidence; the implementation of social theory is a legislative function.

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[7] The Honorable Richard W. McLaren, Assistant Attorney General, Antitrust Division, testifying before the Senate Banking and Currency Committee on May 18, 1970, said that the Board had done "a generally sound and responsible job of handling bank acquisitions." Hearings Before Committee on Banking and Currency on S. 1052, S. 1211, S. 1664, S. 3823 and H.R. 6778 (Bills to Amend The Bank Holding Company Act), U.S. Senate, 81st Cong., 2 Sess., pt. 1, pp. 238, 244.

[8] *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970).

Structure of Banking in Colorado

Colorado is a unit banking state, that is, no bank with an office in Colorado may establish branch banks (Colo. Rev. Stat. 1963 § 14-3-1 (1969)). There are, however, no statutory inhibitions on the development of holding companies. In 1956, Western Bancorporation, with year-end 1970 deposits of $9.7 billion dollars and subsidiaries in 11 western states (Moody's Bank & Finance Manual, 1971), acquired 3 Colorado banks (DX 3). It became the first and remains the largest of the holding companies doing business in Colorado (329 F. Supp. at 1009).

At year-end 1961, the banking picture in Colorado was as follows:

Number of Banks	Number of Banking Organizations	Share of State Commercial Bank Deposits controlled by 5 largest organizations
166	164	52.0%[9]

(DX 28-29).

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[9] The posture of the large wholesale Denver banks in Colorado banking is substantially overstated (with relation to the large retail chains in statewide branching states) by use of gross deposit data. The single-office, wholesale, regional bank in Denver has a much smaller share of the State's small individual depositor business than gross data would suggest. Thus, in 1968, when Bancorporation had 14.99% of Colorado deposits in terms of gross dollars, it had only 5.2% of the *number* of accounts of the small ($0-$1,000.00) depositors and 5.7% of their dollars of deposit although this size account amounted to over 78% of all accounts by number. The 5 largest organizations in the state had 48.3% of the dollars of deposit but only 24% of both dollars and numbers of account in the small depositor category (DX 35).

Even those numbers would need to be scaled down today, as Bancorporation's gross share in June of 1970 had dropped another two percentage points to less than 13% (PX 115).

It will be observed that Western Bancorporation remained the only holding company. The following years, however, saw the establishment of the first locally-based holding companies (DX 3). United Banks of Colorado, the most active, was formed around the Denver United States National Bank (DX 3).

Year Joined Holding Company	Name and Location (County)	Year Bank Organized	Deposits (000) Year-End 1970
1964	Denver U.S. Nat'l. Bank (Denver)	1884	$ 485,442
1964	First Bank of Aurora (Arapahoe)	1943	14,606
1964	Arapahoe Valley Bank, Littleton (Arapahoe)	1958	16,826
1965	Weld County Bank, Greeley (Weld)	1889	27,370
1966	Mercantile Bank & Trust Co., Boulder (Boulder)	1904	25,549
1969	Poudre Valley Nat'l. Bank, Fort Collins (Larimer)	1878	40,189
1969	Arkansas Valley Bank, Pueblo (Pueblo)	1950	19,541
1970	Villa Nat'l. Bank, Denver (Denver)	1966	7,568
1971	Mesa Nat'l. Bank of Grand Junction, (Mesa)	1964	8,279
1972[10]	Colorado Commercial Bank, Colorado Springs (El Paso)	1903	16,267

(DX 2 and 3).

[10] Acquisition approved by Board of Governors of the Federal Reserve System, December 7, 1971 (slip copy of order). Appellant's counsel has gone out of its way to characterize this as a "foothold" and therefore presumably desirable affiliation (Transcript of hearing of August 9, 1971, p. 14).

These nine acquisitions involved $176 million in 1970 deposits and the second largest banks in the communities of Aurora, Littleton and Fort Collins, the third largest in Greeley, Boulder and Grand Junction and the fourth largest in Pueblo and Colorado Springs (DX 2). They suggest that any Justice Department policy against acquisition of leading local banks by the larger banking organizations in the state (and United is the second largest banking organization in Colorado, behind Western) must have originated after 1969 when United acquired Poudre Valley. A further modification of this policy may be seen in the Justice Department's approval of the organization of Affiliated Bancshares of Colorado, Inc. ("ABC") in 1970 (See 1969 Fed. Res. Bull. 954, DX 3). This organization was made up of 13 banks, representing 4 separate banking groups (*id.*).

Year Joined Holding Company	Name and Location (County)	Year Bank Organized	Deposits (000) Year-End 1970
1970	FNB Boulder (Boulder)	1934	$ 68,309
1970	Arapahoe Nat'l. Bank Boulder, (Boulder)	1960	6,958
1970	FNB Lafayette (Boulder)	1953	3,904
1970	FNB Louisville (Boulder)	1915	3,508
1970	Greeley Nat'l. Bank (Weld)	1934	43,735
1970	Cache Nat'l. Bank of Greeley (Weld)	1962	7,738
1970	West Greeley Nat'l. Bank (Weld)	1963	3,557
1970	Farmers Nat'l. Bank of Ault (Weld)	1906	6,221

Year Joined Holding Company	Name and Location (County)	Year Bank Organized	Deposits (000) Year-End 1970
1970	FNB Loveland (Larimer)	1932	$ 25,433
1970	Westlake First Nat'l. Bank Loveland (Larimer)	1964	3,718
1970	FNB Colorado Springs (El Paso)	1874	104,210
1970	Bank of Manitou Springs (El Paso)	1907	3,663
1970	Fort Carson Nat'l. Bank (El Paso)	1967	4,892

(DX 3).

Each of the four groups (one per county) had previously been controlled by its own separate group of individual stockholders (1969 Fed. Res. Bull. 954, 955). They totaled $286 million in 1970 deposits (DX 3) and combined the *largest* banking organizations in Boulder (county and city), Greeley and Weld County, Colorado Springs and El Paso County, and the City of Loveland (DX 2). Since this holding company passed muster *while* Appellant was considering the FNB Greeley acquisition, we must assume that the policy originated in 1969 also excludes affiliations of leading local banking organizations if they do not include leading banks in the largest market in the state.

In 1968, First National Bank of Denver decided to abandon its long struggle to obtain branch banking authority in Colorado and follow its competitors into holding company development (PX 4). It formed Bancorporation with itself and its *de novo* affiliates First National of Bear Valley, First National of Southglenn and First National

of Northglenn as members. Over the next two years, Bancorporation entered into tentative understandings of affiliation with five banks—FNB Greeley, FNB Pueblo, Exchange National of Colorado Springs, Montbello State Bank and Security State Bank of Sterling. The Federal Reserve Board denied two of the applications on competitive grounds (FNB Pueblo and Montbello State, DX 49, DX 52). Appellant brought suit on each of the remaining three. The Exchange affiliation (complaint filed 4/28/71) was abandoned when the principal stockholder of that bank advised that his financial situation would not permit him to await outcome of the litigation (Letter of Bruce D. Alexander of May 10, 1971, Appendix to Motion, filed August 12, 1971, in *United States* v. *First National Bancorporation, Inc.*, Civ. No. C-3077, D. Colo.). The Security State case is pending.[11]

After the trial of this case, Appellee acquired the National State Bank of Boulder, a part of the bankrupt Parsons banking empire. The Appellant again threatened suit by filing a competitive report characterizing the affiliation as "significantly adverse" to competition (Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Honorable Arthur F. Burns, Chairman, Board of Governors of the Federal Reserve System, March 3, 1971). The Administrator of National Banks, in his advisory opinion, characterized National State (a national bank under his supervision) as "endangered" with

[11] Civ. No. C-2754, D. Colo., Complaint filed 12/2/70. It is interesting to speculate on the extent to which Appellant's martial ardour as to the Greeley affiliation derived from its combined fear as to the five proposals. One wonders what might its decision have been if only the Greeley and even more innocuous Sterling applications had been pending at the time the decision to sue Greeley was taken.

an extraordinarily high maturity on its bond portfolio (22 years against a national 5 or under) which, coupled with a high loan-to-deposit ratio and a long term loan portfolio, raised severe liquidity problems (Letter from William B. Camp to Board of Governors of the Federal Reserve System, February 23, 1971). The responsible agency, the Federal Reserve Board, reached the unprecedented conclusion that "the financial condition of the bank, and its management, are so unsatisfactory as to constitute the dominant considerations supporting and more, *requiring*, Board approval of this application." (1971 Fed. Res. Bull. 613, 615, emphasis added.) The acquisition was consummated without suit. Appellee was thereafter forced to replace the entire top echelon of management and inject large amounts of additional capital.

Despite the development of the holding company structure in Colorado since 1961, there has been a significant *increase* in the number of banking organizations and a significant *decrease* in the market share of the largest organizations:

Year End	Number of Banks	Number of Banking Organizations	Share of State Commercial Bank Deposits controlled by 5 largest organizations
1961	166	164	52.0%
1970	228	198	47.8%

(DX 28-29).

The trends in Colorado have been exactly the converse of the trends toward concentration against which Congress created the barrier of the Celler-Kefauver Act of 1950. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315 (1962).

Similarly, there were 3 banks representing 3 banking organizations in Greeley in 1960; there are 6 banks representing 4 banking organizations today (DX 2). Thus, Appellant's "trend toward concentration" (Jurisdictional Statement, pp. 14, 15, 18) is a sheer fable—in the case of *both* Greeley and the State of Colorado.

Appellant's thesis that this affiliation cannot pass muster because of an alleged trend toward concentration in the hands of large holding companies is not only squarely refuted by the evidence, but perhaps more critically, would usurp the regulatory role of the Federal Reserve Board, which is obliged to pass on *every* holding company formation and *every* bank acquisition by a bank holding company under 12 U.S.C. 1828(c) and 1842(a)(3). In the Board's own words:

> Presumably, one of the reasons for the requirement of administrative approval of individual cases, rather than the establishment of firm legislative guidelines, is to permit the recognition of distinctions which may exist among cases which would otherwise be grouped in proscribed or permitted categories. Each application should be analyzed on the basis of the competitive structure of the market and other facts existing at the time of Board consideration of the matter.[12]

By refusing to permit this case by case approach, Appellant would substitute its own prior veto for future Board decisions. We submit that this procedure serves to nullify the regulatory processes which Congress entrusted to the Board.

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[12] Order approving acquisition of the Exchange National Bank of Colorado Springs, Colorado Springs, Colorado, by First National Bancorporation, 1971 Fed. Res. Bull. 345, 348-49.

While a trend towards concentration is central to any Clayton 7 violation, the case fails in many other relevant respects as well. In the absence of actual competition affected herein,[13] we must assess the impact of the affiliation on the *prospect* of competition.

Potential Competition

There are 4 banking organizations in Greeley *now,* there will be 4 in Greeley if this application is consummated. Plainly, competition will not be lessened (unless a vigorous competitive force was being eliminated and a less competitive entity was being substituted—precisely the contrary is true—see p. 28, *infra*). This Court has postulated, however, that a reasonable probability of substantial lessening of competition can result, even when the merging institutions do not compete, upon the juxtaposition of certain conditions of fact. Each are essential to Appellant's case. We shall demonstrate that none of these conditions are present here.

1. *The Market Must Be Highly Concentrated—i.e., The Market Must Already Be Served With Significantly Fewer Entrants Than Are Associated With The Larger Economies Of Scale Attendant Upon The Industry In Question.*[14]

Appellant first concedes, "local banking markets can support only a limited number of banks" (Jurisdictional State-

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[13] Appellant concedes that the two organizations involved herein are not now in substantial actual competition (Jurisdictional Statement, p. 9) and therefore such competition cannot be substantially lessened.

[14] For example, The Honorable George D. Romney, now Secretary of The Department of Housing and Urban Development, testified before a Congressional Committee inquiring into concentration in the automobile industry, while he was Chief Executive

ment p. 17), and thereupon concludes, "such markets are inherently concentrated." (*Ibid.*) Appellant's conclusion is either a mis-labeled truism or pure nonsense. The proposition that local banking markets can support only a limited number of banks means only that a limited number of banks

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Officer of American Motors, that most of the economies of scale in auto assembly could be encompassed by a two line assembly operation producing about 200,000 cars per year. Statement of George D. Romney on February 7, 1958, in Hearings (Administered Prices) Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U. S. Senate, 85th Cong. 2 Sess., pt. 1, pp. 2842, 2851.

Assuming a market which can absorb 1.2 million cars a year, 4 manufacturers would appear to approach an ideal market structure in the public interest. On the other hand, assuming a market which can absorb 10 million cars a year, four manufacturers would appear highly restrictive and to comprehend a "highly concentrated" industry. No one, we submit, would urge that our country should structure its industries to deny to the consuming public at least the larger savings in cost which can be associated with size. Rather, we believe that the Congress' absorption with "high concentration" in its amendments to the Clayton Act was directed toward concentration which it felt significantly exceeded that associated with major efficiencies. (Note Mr. Justice Stewart's observation in dissent, *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 288 (1966), that the level of concentration obtaining in grocery distribution must be tested against the market reality that a single supermarket—through affiliation with a co-operative—could secure all of the economies of scale available to a chain.) Appellant has adopted the position that an industry or any segment thereof is "highly concentrated", i.e., is undesirably structured in that it has too few entrants within the intendment of the Clayton Act, whenever and wherever the share of the market controlled by the four or five larger entrants approached 50%. Thus, Appellant's expert witness concluded that *all* Standard Metropolitan Statistical Areas in the United States, wherever situated, whatever the banking laws, and however the structure was arrived at, were "highly concentrated" in the pejorative sense of the word (Tr. 370, 374-75). Rather than assuming that all 247 separate markets were "highly concentrated", we submit that the more responsible presumption would be that the norms for 247 markets probably closely approximate the natural size patterns appropriate to the needs of the industry.

consistent with the larger economies of scale attendant on the banking industry. Yet a significantly smaller mber of entrants than the market can support is an ential postulate to an hypothesis that lack of a particular tential entrant is a significantly anticompetitive event. a market is adequately or appropriately served by the mber of entrants it presently has, the presence or ab- ce of any number of "potential entrants" cannot be a stantially anticompetitive event. The word "concentra- n", usually associated with the terms "high" or "great" used in the debate on the Amendment to Clayton 7 in 0, is consistent only with a congressional premise that industries under consideration contained substantially er companies than was consistent with their natural ucture (see 95 Cong. Rec. 11484-11507, 81st Cong., 1 Sess. 49)) and not with any suggestion that the public in- est in a quality product at a reasonable price was to sacrificed on the altar of pure numerology in industry uctures.

In 1970, there were 126 cities in the United States with pulations of 30-50,000 people (Greeley had 38,902). ghty-one were served by three or fewer banking organi- ions (64.3%). Thirty-four were served by four bank- organizations (including Greeley) and only 11 by five more (10 by 5, one by 7) (DX 34). Thus, 91.3% of the es of comparable size to Greeley were served by as many fewer banking organizations. Surely, this is evidence t Greeley is not "highly concentrated" in the sense that trong need for more entrants has been established by ply announcing that Greeley is served by four banking anizations. *Some* evidence, at least, that cities the size Greeley need more banking alternatives must be adduced

—none was even offered. In *Philadelphia National Bank*,[15] this Court noted an unhealthy trend toward concentration by pointing out a decline in the number of banking organizations in the market from 108 to 42 over 14 years and a resultant increase in the deposit share of the largest banks from 61% to 90%. The existence of 108 sound banks in a market would appear to be clear evidence that said market can support that number of institutions and at least a trend toward concentration may be fairly derived. But when the number of organizations has increased (as in Greeley) and the only evidence on the reasonableness of that number suggests that it represents a high industry norm, then how justify a conclusion of significantly anticompetitive structure? And if the structure is not anticompetitive, why concern ourselves with a stock of reserve entrants?

2. *The Acquiring Company Must Be One Which Would, In Reasonable Probability, Have Entered The Market Itself In The Reasonably Foreseeable Future If The Affiliation Had Not Taken Place.*

Bancorporation testified flatly, through the executive vice president of its principal subsidiary, that it had no interest in entering the Weld County market by any other route save this affiliation (Tr. 728). Despite voluminous discovery, Appellant was unable to offer a single word to contradict these statements. Instead we are told that subjective representations are irrelevant,[16] and that this Court

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[15] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 331 (1963).

[16] But subjective representations are, if true, not merely relevant, they must be conclusive. For, if we assume that a market is the most desirable in the world, that the rate of return far exceeds that available elsewhere, and that the best interests of the company

must shut its eyes to the unchallenged testimony and look only to "objective" evidence—i.e., the relative attractiveness of the market to an impartial eye. We deny this standard, save as it confirms or denies a conclusion based on conflicting evidence as to subjective intent, but we affirm that such a standard affords but cold comfort to Appellant here. Of the 13 Colorado communities of 25,000 or more, Greeley has had the *lowest* absolute growth over the last 30 years (DX 41). Of all counties of 50,000 or more in the State of Colorado, Weld has (generally by a factor of 2) the *lowest* population per banking office (DX 40). Of all cities of 20,000 or more in the State of Colorado, Greeley has the *lowest* population per banking office (DX 41). Bancorporation had no banking office outside the immediate Denver area, yet by these key criteria, *all* of the other cities of size in the state are more attractive for *de novo* entry.

The market experience of the last commercial bank to be established in downtown Greeley clearly suggests that a fifth downtown bank would have hard sledding. State Bank of Greeley had been an industrial bank with time deposits of about $1.2 million when it converted in 1965

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require entry, nevertheless, if management, in truth, is determined not to enter the market, then the company is not a potential entrant. Objective evidence is useful to test the truth of the subjective conclusion where there are some grounds to question it, as in *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580-581 (1967) and *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 165-166, 172 (1964). It is plain that at least 4 members of this Court as well as the District Court, in the second round of the *Penn-Olin* case, considered the somewhat ambivalent subjective evidence of Pennsalt's intent to be dispositive of the question of potential entry in that case (389 U.S. 308 (1967), affirming 346 F. Supp. 917 (D. Del. 1965) by an equally divided Court). How much stronger is the case here, where there is no conflict as to subjective intent?

to commercial status (DX 2, Tr. 729). By year-end 1970, it had combined demand and time deposits of but $2.1 million (DX 2), or almost no increase in the share of city deposits it had at the point of conversion (DX 39).

3. *The Acquiring Company Must Be One Of A Very Limited Group Of Potential Entrants.*

Even in a critically overconcentrated market, the disappearance of one potential entrant (*arguendo*) could hardly be construed, in reasonable probability, to constitute a substantially anticompetitive event if there remain a significant number of alternatives (literally scores of potential entrants are suggested by the record in this case (*infra,* p. 19)). Thus in *El Paso,*[17] Pacific was the *only* extant pipeline tapping both Canadian and Southwestern sources within easy reach of the California markets (*id.,* at 652). The cost of such a line could be measured in the hundreds of millions. Maintaining the independence of Pacific was critical to a possible dissolution of El Paso's monopoly position. Clorox' monopoly position in chlorine bleach was maintained primarily through advertising (*Procter & Gamble,* 386 U.S. at 572). The products were fungible and purchase of any one in lieu of another rested on a false image of superiority (*ibid*). Procter & Gamble, already dominant in a related field, considering entry itself and being the largest advertiser in the world (*id.,* at 573) was in a *unique* position to challenge Clorox' market power. Its removal from the pool of potential entrants would have been critical to any hoped-for dissolution of Clorox dominance (386 U.S. at 575). In *Penn-Olin,* Pennsalt was the *only* manufacturer of sodium chlorate in the United States without a plant in the Southeast; there were but 3 manu-

[17] *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964).

facturers (378 U.S. at 163-164). Olin owned the patents on the manufacturing process (378 U.S. at 164, 175). Their jointure would mean that any new entrant would not only have to risk the millions associated with plant and sales establishments (see the District Court's opinion, 217 F. Supp. 110, 129, n. 23 (D. Del. 1963)), but would have to surmount high technical barriers.

Consider a commercial bank in Greeley. Unlike a manufacturer or distributor, a banker cannot build a facility to a chosen size. One does not open a $40 million bank. A bank is established at $0 deposits and its plant is designed to comport with its position. No banker erects a mausoleum. He cuts his cloth to his market. Assuming regulatory approval, to open a small bank calls for one qualified lending officer and one to three hundred thousand dollars in capital. Entrepreneurs on this scale are easy to find in Colorado. Between 1960 and 1970, 64 new banks were opened in Colorado (DX 28), only 10 by men associated with the six largest banking organizations in the state (DX 3). There are no barriers to entry worth noting when one small state can create so many new enterprises in a single decade. Plainly there is no dearth of either capital or personnel to organize, buy or operate a modest banking facility. Yet Appellant seeks to preserve Bancorporation to fill no larger role.

Appellant seeks to lift Bancorporation out of this mass of "potential" entrants because it is (a) the largest banking organization (b) not already doing business in Greeley (c) which could open a bank in Greeley. Although there are many which could enter Greeley, our size is held to render our potential entry a uniquely pro-competitive desideratum. Thus it is postulated that if we were to open a bank in Greeley we could somehow use our deposits in Denver to

increase our market share in Greeley more rapidly than could any of the other potential entrants and more quickly take away a large share of the deposits held by the other banks in the market and therefore become an important factor in banking in Greeley quicker than anyone else.[18] The proposition that larger deposits in market A will aid an organization to develop market B has a plausible ring to it. How does the rhetoric comport with the experience of Bancorporation's peers in Colorado, indeed in Greeley?

a. United Banks of Colorado has a larger deposit base than does Bancorporation (Moody's Bank & Finance Manual, 1971). Four of its acquisitions are more than 5 years old (DX 3). In *Boulder* it acquired Mercantile Bank and Trust Company in 1966 (DX 3). At year-end 1965, that bank had 20.1% of commercial bank deposits in the City of Boulder. Until the organization of ABC in 1970, there were no competing holding company affiliates. Nevertheless, United's share had dropped to 17.2% at year-end 1970 (DX 36). The Boulder National Bank, organized in 1964, rose over this same period from 0% to 8.2% (DX 36). In *Littleton,* United acquired the Arapahoe Valley Bank in 1964 (DX 3). That bank had been rapidly increasing its market share at the expense of Littleton National Bank for some years. The market share peaked in 1967 and has since slid off steadily (DX 37). Two new banks have been organized in the market in the interim (DX 37, American Bank Directory, Fall 1971 ed.). In *Aurora,* United acquired the second largest bank in 1964, the First Bank of Aurora, with a 1963 year-end market

[18] We seriously question whether preserving as a potential entrant a bank which (under Appellant's theory) can grow faster than another potential entrant serves any demonstrable competitive purpose.

share of 41.7% (DX 3, DX 38). By year-end 1970, its market share had dropped to 26.4%. It is now the third largest bank in the market behind a bank organized in 1963 (DX 38). A fourth bank has been organized in the market since that time (DX 38 and American Bank Directory, Fall 1971 ed.). In *Greeley* itself, despite the fact that FNB Greeley lost more than 5 points in market share between 1964 and 1970, United has been able to do no more than maintain the market share which its previously independent subsidiary, Weld County Bank, had held in the first half of the 1960's (DX 3, DX 39), although that bank had increased its market share at FNB Greeley's expense—by 5 points—between 1950 and 1960. (DX 39). It remained for Greeley National, then unaffiliated with a holding company, to take unto itself and its affiliates the entire share (1964-1970) which had slipped away from FNB Greeley.

b. The experience of Western Bancorporation—16 times the size of Bancorporation (Moody's Bank & Finance Manual, 1971)—is similar. In *Englewood,* it acquired the Continental National Bank of Englewood in 1956. Continental had been the largest of the two banks in the market with 64% of deposits. A third bank was established in 1965 and is prospering. Continental's market share has dropped to 59%. In *Fort Collins,* Western had acquired First National with 51.1% of city deposits in 1957 (DX 2-3). This market share held through 1970 (51.8%) while two new banks entered the market (DX 2). In *Denver,* the market share of Western's American National Bank rose .4% while 17 new banks were organized (DX 2-3).

Thus the market experience of Bancorporation's larger competitors in Colorado may be summarized as follows: of these 7 markets, the market share of the acquired bank dropped perceptibly in 3 (Boulder, Aurora and Englewood),

rose perceptibly in one (Littleton), and changed only by a fraction of a point in three (Greeley, Fort Collins and Denver). During the period in which those banks were controlled by these holding companies, 24 new banks were organized in their markets.

This experience of larger banking organizations in the same state, even in the same market, is not compatible with a conclusion that Bancorporation's acquisition of FNB Greeley would discourage new entrants or somehow preserve FNB Greeley's market share by force of Bancorporation's size; or that a *de novo* entry by a Bancorporation subsidiary (assuming agency approval could be obtained) would involve growth disproportionate to that obtainable by others.[19]

The Regional Administrator of National Banks testified that he would not, in the foreseeable future, charter an additional bank in downtown Greeley (Tr. 829-830). Is this compatible with a highly overconcentrated market? The State Banking Board twice in 1970 (DX 42-43) denied new charters in Boulder, a city twice the size of Greeley with the same number of banks. Is its conclusion that Boulder was already adequately banked[20] compatible with

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[19] Bancorporation intends to reverse the historic slide of FNB Greeley's market shares (DX 39), but to do so by improving the quality of the management, by more and better services, by more aggressive solicitations and the like (Tr. 729, 732-741). We apprehend, however, Appellants' thesis to cover market shares obtained or preserved on account of size alone. That thesis is certainly at odds with the market experience encountered by the older holding companies in the state.

[20] "The Boulder community presently appears to be well served by existing financial institutions. . . .

"It could be argued that additional banks, conveniently located, will further the interests of the depositing public. A bank situated on every block would, no doubt, be desirable from the standpoint

a conclusion that Greeley is a highly concentrated market? In any case, since only these two agencies could approve a new charter, it seems beyond dispute that, for the foreseeable future, *there are no potential entrants into commercial banking in Greeley.* To characterize one as a potential entrant requires both *intent*[21] and *capacity.* Bancorporation has plainly shown that it has no such intent. Colorado National, which has applied for a charter in the outskirts of Greeley, equally plainly does have such intent. But the evidence as to the likelihood of agency approval establishes beyond reasonable doubt that neither organization has the *capacity* to establish a new bank.

To sum up on potential competition:

(1) Bancorporation has no intention of entering the Greeley market other than by this affiliation. This flat assertion is uncontradicted and comports with the "objective" facts associated with the area, i.e., relative attractiveness of Greeley as a banking market.

(2) Bancorporation could not secure a charter even if it sought one. The regulatory agencies would not permit it.

(3) Greeley is not a "highly concentrated" market as that term is comprehended by the Clayton Act. The

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of some depositors and prospective customers. On the other hand, we do not feel that such a chartering procedure would be in keeping with the trust imposed upon this Board by the Colorado General Assembly." Order denying the application for charter of Boulder Valley Bank. Colorado State Banking Board, 2/3/70, DX 42, pp. 6, 7.

[21] "The existence of an aggressive, well equipped and well financed corporation . . . *waiting anxiously to enter* an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." *United States* v. *Penn Olin Chemical Co.*, 378 U.S. 158, 174 (1964). (Emphasis added.)

number of banking organizations serving Greeley represents a high national norm which, in the absence of evidence to the contrary, must be concluded to relate to the economies of scale attendant upon that industry.

(4) More than 50 entrepreneurial groups in Colorado have formed new banking organizations in the last decade; the capital and technical requirements for a new charter are so modest that the withdrawal of a particular *(arguendo)* potential entrant, of whatever size, would have no discernible impact on this widespread pool of remaining putative applicants.

Appellant bore the affirmative burden of establishing each of these propositions. The absence of *any* of them is fatal to his case. We submit that the only evidence submitted on any of them went to the negative of the proposition. Appellant's case failed for want of evidence on *every* key proposition. Rhetoric is not an acceptable substitute.

Competition In The Market Served By The Acquired Firm Must, In Reasonable Probability, Be Substantially Adversely Affected

In *Philadelphia, supra,* 374 U.S. at 371, this Court stated that an otherwise *unlawful* merger "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Such are the rags and patches from which this suit is stitched that appellant feels compelled to contend that even if there are pro-*competitive* effects of this affiliation in the affected market, they are to be wholly disregarded if any anticompetitive effects can be found in determining *lawfulness.*

(See e.g., Plaintiff's Supplemental Brief in the District Court, pp. 2-3, 11.) Under those ground rules, if the final score after the evidence was in was Defendants 35, Justice 7, then Justice would win. Although we do not concede the 7 points, we conceive the argument to be a perversion of the statute. There are important pro-competitive effects of this proposed affiliation. We believe that any court would be remiss in its statutory responsibilities to ignore them.

FNB Greeley has had a steadily declining share of Greeley deposits for the last 20 years. Its 49.8% share in 1950 dropped to 32.6% in 1970 (DX 39) (and still lower to 31.9% in mid-1971[22])—a consistent trend both before and after the holding company affiliations of its primary competitors. This inability to compete effectively was broadly attributed by the Regional Administrator of National Banks to persistent management deficiencies (Tr. 825, 741, 990). Further, the application had noted a heavy emphasis on agricultural lending, with a corresponding weakness in consumer and real estate financing in the FNB Greeley loan portfolio (DX 19). Bancorporation has pledged to supply competent personnel to fill the management gap; to supply technical personnel in consumer and mortgage financing, and to supply one million dollars in additional capital for an agricultural cooperative (DX 19; Tr. 735-737). This last would free seven million in FNB Greeley loanable funds for the consumer and mortgage fields while maintaining FNB Greeley's agricultural commitments (Tr. 735). There can be no question but that this would make FNB Greeley a more effective competitor. As the Chief Executive Officer of FNB Denver (principal operating subsidiary of Bancorporation) testified:

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[22] American Bank Directory, Fall, 1971 ed.

> If we can compete in Greeley with the United Banks of Colorado and the A. B. C. group, there will be competition; I'll guarantee you there will be a hell of a lot of it that is not there now, and has not been there in the past. (DX 69.)

These are pro-competitive effects of the proposed affiliation. They are not lost by showing that there are others who would do as much (although Appellant has not even done this), for if we assume that there are other interested banking organizations or groups of entrepreneurs which could similarly supply the management, the knowhow and the capital to turn FNB Greeley around, then *a fortiori*, we assume that they could acquire or organize and staff a much smaller bank. Their interest, if any, in the market as a focus for *de novo* entry should logically be unimpaired. If a larger organization than Bancorporation (United) and the strengthening of the dominant organization in the market (through ABC) did not chill the interest of this group, why should we?

Appellant suggested to the Court below that one anticompetitive effect of the proposed affiliation would be an increased potential for sophisticated anticompetitive conduct in Greeley and in other markets in Colorado upon the part of "statewide" organizations to the detriment of competitive vigor in those markets (Jurisdictional Statement, p. 17).

The burden of establishing this proposition was Appellant's. As the District Court pointed out, there was no "cogent evidence *which even suggests* that there is likely to be a lessening of competition." (329 F. Supp. 1003, 1016.) (Emphasis added.) We note initially that Bancorporation is not a "statewide" institution. At the time of trial its only banking offices were in Denver.

As Bancorporation was jumped on its first proposed acquisition, it would seem that this attack might more properly be raised against United Banks, Western or ABC which already exercise a significant influence in numerous markets. Appellant's *sole* documentation of its thesis was a memorandum (PX 183) from the Business Development Department of FNB Denver written to recommend what policies it ought to take in response to an innovative service charge program instituted by the Colorado National Bank. The memorandum recommended that FNB Denver ought to *beat* the rate schedule of Colorado National but warned against too radical a difference. "The theory behind this was to keep from undercutting the Colorado National to such a point that we would start a service charge war which could end in giving away all checking accounts. This is also a simple formula to explain and advertise." We do not think that this statement reflects anything more than the rational business judgment of a vigorous competitor. Had it been the final word of FNB Denver on the subject, we would argue that it reflected a healthy competitive milieu. But it is not. The executive committee of the bank rejected the proposed rates. They chose to adopt even lower, more aggressive schedules (Tr. 868-9).

Appellee did not rest, however, with the negative of the proposition. Our experience in the state suggested to us that not only was Appellant's proposition without substance, but that the converse was true. We believe that FNB Denver was an aggressive bank in a tough banking market, while competition in the smaller outlying cities of the state left much to be desired. We set out to prove that proposition.

We reasoned that any organization making an acquisition in a new market could hardly be found substantially

to lessen competition in a not very competitive market; and that a vigorous competitor might be given the benefit of an assumption that its policies would have continuity and not be abandoned in the first new market it reached. Dr. Nevins Baxter, a leading banking economist, was asked to survey the business practices of banks in cities throughout the State of Colorado. Dr. Baxter and his staff interviewed hundreds of bank customers throughout the State as well as the management of a number of banks in both Denver, Greeley and other communities in Colorado (Tr. 955, *et seq.*). They found significant differences in competitive conduct. Denver was an actively competitive market (Tr. 1000-01); FNB Denver was an aggressive bank; FNB Greeley was not (see Tr. 990). Whereas Denver is an actively competitive market (Tr. 1000), generally there is little active banking competition in smaller Colorado communities (Tr. 997, *et seq.*). The Regional Administrator of National Banks testified to the same effect (Tr. 831, 832).

If we concede that non-competitive conduct on the part of the holding companies would have a more pervasive effect if they occupied a more prominent role in Colorado banking, must we not equally concede that vigorous competition on their part would have a more general effect if they occupied a more prominent role in Colorado, as well? And if the evidence adduced in this case clearly supports the latter conclusion of fact, ought we not opt for expansion of the holding companies?

Expressed in its simplest terms, Appellant argues that Bancorporation and its competitors ought not be permitted to take over the banks in Smalltown, Colorado because if they conspired not to compete in Denver the effect would

spill out over to Smalltown automatically. But if there is now no competition in Smalltown and there is in Denver, ought not that takeover spill over the healthy competition of Denver into Smalltown, equally automatically? In an imperfect market (Colorado), competition is best served by the holding companies. If competition is our goal, how do we sustain it by suppressing holding company growth?

Further, Appellant asserts that the net effect of permitting Bancorporation to acquire FNB Greeley would be to increase statewide concentration[23] and, as everyone knows, that is bad. Or is it? Statewide concentration levels are at their lowest in states which permit little or no branching—averaging but 37% in the five largest organizations (DX 32). It is highest in those states permitting statewide branching—85% in the five largest (DX 32). On the thesis advanced at the beginning of this paragraph, the highly restricted branching states ought to have the more competitive environment. By one objective test, however, the converse is true. As this Court has observed, banking markets are essentially local. *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 362 (1970). How do "highly concentrated" states compare with "low concentration" states in the number of competitive options available per market? *All* cities in the two groups of states in size categories 5-10,000; 10-15,000; 15-30,000 and 30-50,000[24] were tested for numbers of competitive options.

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[23] There was absolutely no evidence introduced to support the proposition that the State of Colorado was a relevant market in which to assess the vigor of potential competition. We deny that the State is such a market but shall, nevertheless, refer to the fictional statewide concentration levels as postulated by the Appellant.

[24] Towns which are smaller than 5,000 tend to be natural monopolies; towns larger than 50,000 tend to encompass more than one market.

The universe encompassed more than 1,500 cities. They showed the following:

	Average Number of Banking Organizations Per City			
	5-10,000	10-15,000	15-30,000	30-50,000
(1) States with Unlimited Branching	2.21	2.90	3.46	3.83
(2) States permitting no branches or branches only in headquarters county or less	1.91	2.26	2.63	3.12
Percentages by which (1) exceeds (2)	15.7%	28.3%	31.6%	22.8%

(DX 34).

Plainly, the number of competitive options in local markets is significantly greater in the "high concentration" states and justifies the conclusion that the higher the state (i.e., non-market) "concentration" the greater the competitive options. We do not leap on this fact and conclude triumphantly that an increase in statewide "concentration" in Colorado is *therefore* a competitive desideratum of the highest order, but we do suggest that it is at least a valid datum on Appellant's *ipse dixit* that increases in statewide "concentration" establish substantial lessening of competition in particular markets.

Appellant's Vertical Case

ommercial banks perform a number of services for nselves and for their customers. These services include a processing, purchase and sale of municipal bonds, ek clearing, credit cards, Federal Funds, pension and fit sharing plans, and commercial loans (pp. 889-900). ne of the customers who purchase these services are er commercial banks who buy such services on behalf their customers (or in the case of Federal Funds, themselves). Appellant amended its complaint in action to charge—for the first time in ten years of k acquisition litigation—that the acquisition of FNB eley would, in reasonable probability, substantially en competition in banking in Colorado, in that:

h) This acquisition, combined with the trend of acquisitions by leading banking organizations in Colorado of independent banks with substantial positions in markets throughout many parts of the state, will substantially reduce existing competition in providing correspondent banking services in Colorado, increase barriers to new entry into correspondent banking services in Colorado, and effectively foreclose the remaining independent banks in many markets from access to correspondent banking services in Colorado.[25]

ppellant contended that in a line of commerce limited a "package" of correspondent services offered by six merated Denver banks,[26] as measured by gross demand

[25] Added to the complaint herein on January 15, 1971.

[26] FNB Denver, United Bank of Denver, Colorado National k, Central Bank and Trust Company, American National Bank Security National Bank.

deposit accounts maintained in those six banks by that portion of their commercial bank customers who have their headquarters in Colorado (and excluding from such bank customers those which are subsidiary to holding companies which contain one of the "Denver Six", or as to which applications were pending to become subsidiaries), competition would be substantially lessened (a) between the acquired bank and its competitors who would be unduly limited in their choice of offerors of correspondent services (backward vertical integration) and (b) between the Denver offerors of correspondent services who were acquiring customers and the other Denver offerors who were not (forward vertical integration).

Backward vertical integration was abandoned almost as it was announced when Appellant was apprised of the flat inconsistency of its arguments. Under Appellant's premise of resultant foreclosure—which we deny—Greeley banks seeking alternative Denver correspondents would be foreclosed *identically* under either acquisition or *de novo* entry (which Appellant actively urges).

The Federal Reserve Board spoke persuasively to this and other of Appellant's vertical integration arguments in its approval of the proposed affiliation of the Exchange National Bank of Colorado Springs with Bancorporation (abandoned, after suit):

> The Board has considered a comment by the Department of Justice, which concludes that the proposed acquisition would have a significantly adverse effect on competition on the grounds, among others, that consummation of the acquisition might eliminate a source of correspondent services for unaffiliated Colorado Springs banks. . . .

As regards the possible loss of correspondent services, the argument appears to be premised on the theory that the affiliation of a Denver bank with a Colorado Springs bank will reduce the number of correspondents for the other banks in Colorado Springs, in part because these banks would be unwilling to entrust confidential or business data to an affiliate of a competitor. However, correspondent services vary in character and importance, and the majority could be equally well performed by banks outside the areas in which the Justice Department alleges anticompetitive effects. Banks in Colorado Springs and in the State have more "upstream correspondents" outside than within the State. Portfolio and management advice, loan participations, and miscellaneous specialized services could be furnished by these out-of-State correspondents. Check processing may be done by banks with computer facilities, at service bureaus or at the Federal Reserve in Denver; no confidential information is involved which might preclude a bank from seeking the services of an affiliate of a competitor.

Moreover, the argument relies, in part, at least, on the premise that Applicant's Denver subsidiary, a leading correspondent bank in the State, would be less desirable or less available as a correspondent for banks in the Colorado Springs area if it had an affiliate in that area. A difficulty with the argument is that it would appear applicable, if valid in any case, to any proposal through which the Denver bank would obtain a Colorado Springs affiliate, without particular regard to the size or market position of such affiliate. More broadly applied, it argues against permitting a large correspondent bank to become a subsidiary of a holding company, or in any other way expand into markets in which are located banks for which it serves, or could serve, as correspondent. The Board is not aware of any evidentiary basis for the premise on which the argument is based, and, in the absence of

> a demonstration that such expansion in fact, rather than in theory, leads to a curtailment in the availability of essential correspondent services, is unwilling to adopt that conclusion as a principal basis for curtailing expansion which is likely to result in better service to the communities affected.[27]

The forward vertical integration aspect of Appellant's novel claim suffers from several major debilities.

Appellant contends that, taken together with the previous acquisitions (by others), the acquisition of FNB Greeley in reasonable probability would substantially lessen competition, presumably by reducing the pool of potential recipients of correspondent services offered by Bancorporation's competitors to an unacceptable level—the "drying up" argument. Appellee has no quarrel with this theory, but, apparently, Appellant refuses to be a prisoner of anyone's logic, even his own. While this suit was under active contemplation or subsequent to its filing, Appellant has permitted (or has indicated that it will permit) the acquisition of six other banks by United Banks of Colorado and Colorado CNB Bankshares, two holding companies whose prior acquisitions allegedly, in material part, formed the predicate for a violation in our initial acquisition.[28]

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[27] Statement of Board of Governors of the Federal Reserve System, In the Matter of the Application of The First National Bancorporation, Inc. (The Exchange National Bank of Colorado Springs), 1971 Fed. Res. Bull. 345, 348; see also, Defendants' Trial Brief in the Court below, p. 60.

[28] Lakewood Colorado National Bank (by Colorado CNB Bankshares, 11/1/69); Villa National Bank (by United Banks of Colorado, 4/8/70); Mesa National Bank (by United, 12/21/70); Bank of Glenwood (by Colorado National, 4/7/71); First National Bank of Sterling (by Colorado CNB, pending); Colorado Commercial Bank (by United, pending).

These six banks had year end 1970 combined deposits of $56 million (DX 2). Appellant justifies his choice by observing that these banks are *smaller* than FNB Greeley and therefore their acquisition is not as damaging as FNB Greeley's would be. Like most of the *ipse dixits* upon which this case is predicated, no proof is offered on a premise which offends simple reason. If a bank needs to turn to another for services, it is because it cannot economically perform them itself. The larger the bank, the smaller the need. If the loss of the business of FNB Greeley would substantially lessen competition among offerors of correspondent services, then, *a fortiori,* the loss of the business of the six banks whose acquisition Appellant has approved similarly would substantially lessen competition to an even greater degree.

Statistical Case

Appellant claims that FNB Greeley's acquisition would remove from the pool of potential Colorado recipients of correspondent services offered by the six enumerated banks a recipient (FNB Greeley) accounting for 1.2% of such services (Jurisdictional Statement, p. 24). This percentage was arrived at by doing extreme violence both to the numerator and to the denominator.

To limit our inquiry to six enumerated Denver banks (the denominator) we must conclude that "correspondent services" are sold in "packages" (yet, each Colorado bank has an average of 5.4 correspondents (DX 1, DX 16).[29] We

[29] This figure understates actual correspondent relationships. Habitually, banks do not report all of their correspondents (Tr. 1285). See also the Federal Reserve Board's comments on Appellant's vertical arguments cited above (pp. 31-35). This conclusion of the bank supervisory agency as to the diverse sources of service to which banks can and do turn is incompatible with a claim of "packaged" banking.

must also conclude that other offerors of "correspondent services" are in some way artificially inhibited in their ability to compete against the six enumerated Denver banks for each of the "packaged services" (yet, the evidence showed that 15 organizations sold data processing services to banks in Colorado (Tr. 898-99); that the market for Federal Funds is a national one, with locational advantages in west coast banks, and with California and New York taking the bulk of the business (Tr. 894-95); that municipal bonds are sold by brokerage houses to banks throughout the country (Tr. 895-896); that the market for credit card sales and service is a national one (Tr. 897), as are those for the sale of pension and profit plans and the purchase of overline loans (Tr. 890, 897-98); that the largest single offeror of check clearing services is the Federal Reserve Bank (Tr. 891)).

To further limit the denominator by excluding non-Colorado banks served by the "Denver Six" is to ignore that FNB Denver and its local competitors receive 35-40% of their correspondent balances from banks outside Colorado (PX 203); that more than half their correspondent accounts come from outside the state of Colorado (DX 16); and that they regula· , travel a territory including Colorado, Kansas, Nebraska, Wyoming, New Mexico, and part of Montana, Idaho and Texas (Tr. 1063). Appellant excludes from his denominator any Colorado bank which is an affiliate of one of the "Denver Six". Although we assume that Appellant's theory was that such affiliations are already beyond competitive reach, they are, nonetheless, part of the universe of banks in the market asserted and must logically be part of our base. The assumption, moreover, however central to Appellant's underlying

thesis, is erroneous. FNB Denver is a principal supplier of correspondent services to banks in Colorado which are subsidiaries of other holding companies having a subsidiary among the "Denver Six" (e.g., Western Bancorporation and First Colorado Bankshares) (Tr. 875-80). FNB Greeley, now three years after the agreement to affiliate, still uses three of the "Denver Six" among its principal correspondents (PX 29).

Moreover, the statistics are hopelessly compromised by the measuring rod—gross demand deposit accounts maintained by one bank at another. Most correspondent services, e.g., data processing, purchase and sale of municipal bonds, credit cards, Federal Funds, commercial loans, and pension and profit sharing plans are paid for by fee or cash percentages on gross prices (Tr. 899-901). The only significant service which is traditionally (though by no means exclusively, Tr. 906) paid for by deposit balances[20] is check clearing (*ibid*). Gross balances are not a proper measurement of even this type of correspondent service (Tr. 903, Tr. 1064), as is apparent from the FNB Greeley account. (See DX 65, Tr. 907-909.) When bank A or the Federal Reserve Bank clears bank B's checks for it, bank B is given a credit for deposits which have not yet cleared through the bank of origin. This is called "float", and of course reflects no income to the clearing bank (Tr. 908). If bank B maintains a $1.1 million demand deposit account with bank A (or taps its resources with the Federal Reserve Bank), only the difference between "float" and gross

[20] The balance is only a beginning figure. A monthly analysis of account profitability is run, and if the account is not profitable, a bill is sent quarterly. A bank running consistently at a loss may increase its balances or continue paying in cash—FNB Denver is indifferent (Tr. 899-901).

balances represents usable balances for bank A against which it can charge its processing costs and earn its profit. Thus FNB Greeley had an average balance of $1.1 million at FNB Denver in 1970, but had an average float of $800,000 (DX 15). It is only against the net balances ($300 thousand) that FNB Denver could charge its costs and measure its profits (Tr. 908). Thus, it is only with respect to *net* balances or to profits that we can measure that portion of the "Denver Six" business which would be "usurped" *(arguendo)* by the affiliation. Since we have no statistics in this record from which we can measure net balances, we are left to measure the impact of the proposal on net profits of the "Denver Six." Account analysis of the FNB Greeley account with FNB Denver in 1970 showed a net operating profit of $5,000 (or $2,500 after taxes) (DX 65, Tr. 907). Net income of Bancorporation after taxes was $5.4 million (Moody's Bank & Finance Manual, 1971). Thus the contribution of the FNB Greeley account to the profitability of Bancorporation was five one-hundredths of one percent. The profit "foreclosure" among the "Denver Six" was less than one-one-hundredths of one percent.[51]

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[51] 1970 net income and deposits (in Colorado) of the "Denver Six" were as follows:

Holding Company	Net Income	Deposits (000)
FN Bancorporation	$ 5,411,800	$589,633
United Banks	5,532,621	645,370
Colorado National	2,465,393	315,040
Western Bancorporation*	72,846,636	221,547
First Colorado Bankshares	1,143,272	146,926

(Moody's Bank & Finance Manual, 1971, DX 3).

* To find that portion of Western's earnings allocable to Colorado we assumed that it earned, relative to its Colorado competitors, in the same proportion that it had a deposit base in Colorado. This gave us a figure of $1,883,796 or total "Denver Six" Colorado earnings of $16,436,882.

Competitive Impact

That the competitive effect of this proposed affiliation upon the offerors of correspondent services—even in Appellant's absurdly truncated geographic and product markets—would be *de minimis* is demonstrable in a number of ways:

(1) it would foreclose (*arguendo*) less than one-one hundredth of one percent of the earnings of the affected institutions;

(2) FNB Denver has 1,452 employees, its correspondent business occupies part of the energies of 15 of them (Tr. 888).

In addition, despite the alleged foreclosure, three new offerors of correspondent services have entered the lists since this affiliation was announced (First Colorado, Tr. 550, DX 3; ABC, Tr. 497; and a new holding company in organization, Tr. of hearing on Aug. 9, 1971, p. 26).

Finally, there has been no "drying up" of customers. To the contrary, in 1961, there were 159 potential bank customers for correspondent services in Colorado, with combined deposits of $1.1 billion. At year end 1970, there were 211, with combined deposits of $2.[illegible] billion (Tr. 1056, DX 28, DX 29).

The relevant "line of commerce" or "product market" is, in any case, "large bank services", not the *way* in which they are obtained. Correspondent banking is a method of securing the services of big city banks in smaller communities (Tr. 1045). As a method, it competes with the methods of disseminating those same services entailed in branching

or membership in holding companies. A majority of the small banks in the State of Colorado have successfully banded together to bar the creation of branching systems in the State. We must be careful to avoid the same result with holding companies.

Correspondent banking is, to the big city bank, a money making tool, as is branching and structuring holding companies. Their push in any of these directions must arise from their conclusion that one is a more effective, efficient, i.e., profitable method of disseminating their services. We submit that the various methods of offering large bank services to smaller communities should be permitted to compete freely—the more effective methodologies receiving the dominant share—the core of competition. Appellant's fears that the permanency of holding companies and branching relationships would drive out the correspondent relationships may be translated from the vertical case alleged to a typical horizontal concentration argument, to which portion of this memorandum the Court is respectfully referred.

CONCLUSION

Appellant's case is a simple one. The facts are not disputed. FNB Denver is one of the larger banks in Colorado. It had no offices outside the immediate Denver area. FNB Greeley, the 1,385th largest bank in the United States, is the second largest bank in Greeley. Appellant contends that the affiliation of FNB Greeley and FNB Denver would, therefore, in reasonable probability substantially lessen competition in Greeley.

The number of banking organizations in Colorado has been increasing sharply over the last ten years. The share

of state deposits controlled by the 5 largest banking organizations has decreased. The parties are in agreement that a limited number of banks per community is a natural structure for banking. Greeley has more or as many banking organizations as 91% of communities in the United States which are of similar size. There is then no demonstrated need for additional entrants. But if no more entrants are needed, then the disappearance of a potential entrant, even if it were the only one, could not be a substantially anticompetitive event. There are, in Colorado, some 54 groups of entrepreneurs distinct from the larger holding companies who have organized new banks in the past 10 years. The resources and the technical personnel associated with the organization of a new bank or the acquisition of a very small bank in Greeley are on an order of magnitude associated with the organization of the previously stated 54 banks. There is thus no *need* to have Bancorporation among this broad base of potential entrants. Potentiality, further, implies capacity, and the evidence was persuasive that the regulatory agencies would not let further banking organizations into Greeley in the foreseeable future.

Even if the concentration of state deposits in the hands of the largest banking organizations was up instead of—as it is—down, the relevant consideration is competition in banking markets, which are local. National patterns show a marked advantage in the number of competitive options in the states with the highest statewide concentration over those with the lowest statewide concentration.

Moving from the abstract to the concrete, FNB Greeley has been a largely ineffective bank with a sharply declining share of Greeley deposits, a weak management and an over-

emphasis on a single class of customers. Bancorporation has offered a concrete program to reverse this trend and the evidence shows that its principal subsidiary is itself a hard competitor. If the evidence shows anything as to Greeley, it shows a prospect of *increased* competition resulting from the affiliation.

If this Court is inclined to construe potential competition in banking within the ground rules previously laid down, then Appellee respectfully suggests that the undisputed facts here fall so far within those boundaries that no further time ought be expended on this case. Even if the Court should be inclined to explore new frontiers of the law, we believe that the wholly negative contours of this case are entirely inappropriate to that purpose. For these reasons we respectfully urge the Court to grant this motion and affirm the judgment of the Court below.

Respectfully submitted,

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APPENDIX

APPENDIX A

Federal Reserve Board Merger and Acquisition Denial Record Compared With Non-Bank Merger Enforcement Record, 1960-1970

	Non-Bank Mergers and Acquisitions			Federal Reserve Board Action on Bank Merger and Bank Holding Company Acquisitions and Formations		
Year	No.[1] Recorded	No. Complaints[2] Filed	% Challenged	Actions[3]	Denials	% Denied
1960	1238	24	1.9%	34	4	11.8%
1961	1578	17	1.1%	51	8	15.7%
1962	1454	10	0.7%	68	10	14.7%
1963	1320	14	1.1%	45	7	15.6%
1964	1651	15	0.9%	29	3	10.3%
1965	1728	22	1.3%	40	3	7.5%
1966	1582	22	1.4%	47	5	10.6%
1967	2232	14	0.6%	44	5	11.4%
1968	3723	15	0.4%	59	3	5.1%
1969	4268	32	0.7%	114	7	6.1%
1970	2614	17	0.7%	184	11	6.0%
Total	23388	202	0.9%	715	66	9.2%

[1] "Current Trends in Merger Activity, 1970", F.T.C., less number of applications approved by Federal Reserve Board, The Comptroller and F.D.I.C. under 12 U.S.C. 1828(c) and 12 U.S.C. 1842(a)(3), as reported in "Proceedings of a Conference on Bank Structure and Competition" (Federal Reserve Bank of Chicago, 1970) and 1970 annual reports of the three federal banking agencies.

[2] F.T.C. and Department of Justice Section 7 complaints filed, as reported by F.T.C. Office of Management and Legal Procedures Unit of the Antitrust Division for each fiscal year shown; less bank merger and bank holding company acquisition complaints in each calendar year shown, as reported in CCH Trade Regulation (Current and Transfer Binder) Reports.

[3] Approvals and denials by Federal Reserve Board under 12 U.S.C. 1828(c) and 12 U.S.C. 1842(a)(3). Source: See n. 1.